02-1183 JAN 12 2003

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL FRANCIS PATANE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a failure to give a suspect the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 304 F.3d 1013.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2002. A petition for rehearing was denied on December 9, 2002 (App., *infra*, 34a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

On June 19, 2001, a grand jury sitting in the District of Colorado indicted respondent for possession of a firearm after having previously been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court granted respondent's motion to suppress the firearm. The court of appeals affirmed. App., *infra*, 1a-33a.

1. On June 6, 2001, Officer Tracy Fox of the Colorado Springs Police Department arrested respondent outside his residence for violating a domestic violence restraining order. Shortly thereafter, Detective Josh Benner, who was part of a gun interdiction task force of the Bureau of Alcohol, Tobacco, and Firearms and who had been told by a probation officer that respondent was a convicted felon and possessed a Glock .40 pistol, began reading respondent his *Miranda* rights. After he was advised of his right to remain silent, respondent told the detective that he knew his rights. At that point, Detective Benner stopped reading the *Miranda* warnings. App., *infra*, 2a-4a.

Detective Benner asked respondent what guns he owned, and respondent replied that a .357 was already in police custody. Benner asked respondent about the Glock pistol, and respondent said that the pistol was on a wooden shelf in his bedroom. Respondent gave Benner permission to retrieve the pistol, and Benner went into the residence, found the pistol on the shelf, and seized it. App., *infra*, 4a.

2. The district court granted respondent's motion to suppress the firearm, ruling that the police officers lacked probable cause to arrest respondent for violating the domestic violence restraining order. App., *infra*, 1a. The court did not rule on respondent's alternative argument that the firearm should be suppressed as the

fruit of an unwarned statement by respondent. *Id.* at 11a. The government appealed.

3. The court of appeals affirmed. App., *infra*, 1a-33a. The court reversed the district court's ruling that respondent's arrest was not supported by probable cause. *Id.* at 5a-9a. The court nevertheless affirmed the district court's suppression order on the alternative ground that the firearm was inadmissible as the fruit of a statement obtained without *Miranda* warnings. *Id.* at 10a-33a.

The court acknowledged that this Court in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985), had "declined to apply the fruits of the poisonous tree doctrine of *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963), to suppress evidence obtained from an un-Mirandized confession." App., *infra*, 11a-12a (citation omitted). The court also acknowledged that in *United States* v. *McCurdy*, 40 F.3d 1111 (10th Cir. 1994), it had previously read *Elstad* and *Tucker* to prohibit the suppression of physical evidence obtained as a result of a defendant's unwarned statement except when the statement was not voluntary. App., *infra*, 19a. The court concluded, however, that this Court's holding in *Dickerson* v. *United States*, 530 U.S. 428 (2000), that *Miranda* is a constitutional rule "undermined the logic underlying *Tucker* and *Elstad*." App., *infra*, 13a. The court therefore held that it was not bound by its prior decision in *McCurdy*. *Id.* at 19a-20a.

Examining the issue anew, the court concluded that neither *Elstad* nor *Tucker* supports the proposition that *Miranda* permits the introduction of derivative physical evidence when the defendant's unwarned statement was voluntary. App., *infra*, 15a-21a. The court emphasized that *Tucker* involved an interrogation

that occurred before *Miranda* was decided, and read *Tucker* as resting "largely on [the] conclusion that excluding the fruits of [the unwarned] confession would have minimal prophylactic effect because the officers were acting in complete good faith under prevailing pre-*Miranda* law." *Id.* at 13a. The court distinguished *Elstad* on the ground that the evidence derived from the unwarned statement in *Elstad*—subsequent voluntary statements made by the defendant after the administration of *Miranda* warnings—was a product of the defendant's volition. *Id.* at 16a-18a.

The court acknowledged that "[c]ourts applying [*Dickerson*] have split on the proper application of *Wong Sun* to the physical fruits of a *Miranda* violation." App., *infra*, 20a. Rejecting the approaches of the Third Circuit in *United States* v. *DeSumma*, 272 F.3d 176 (2001), cert. denied, 122 S. Ct. 1631 (2002), and the Fourth Circuit in *United States* v. *Sterling*, 283 F.3d 216, cert. denied, 122 S. Ct. 2606 (2002), the court decided that a deterrence rationale required the suppression of physical evidence derived from statements made by a suspect who had not been given *Miranda* warnings. App., *infra*, 21a-28a. Rejecting the approach of the First Circuit in *United States* v. *Faulkingham*, 295 F.3d 85 (2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002), the court also decided that the suppression of derivative physical evidence was required even when a police officer's failure to comply with *Miranda* was negligent rather than intentional. App., *infra*, 28a-33a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that a failure to give the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), mandates not only that the defendant's unwarned statement be excluded from the prosecution's case-in-chief, but also that any physical evidence derived from that unwarned statement be suppressed. That holding is incorrect and significantly departs from this Court's *Miranda* jurisprudence. In concluding that physical evidence that is the "fruit" of an unwarned statement must be suppressed, the court also created a conflict among the circuits on an important constitutional issue that arises with regularity. The resolution of that issue directly affects the administration of criminal law in the federal and state courts. This Court's review is warranted.

A. The Fruits Of Unwarned Statements Are Admissible Under This Court's *Miranda* Decisions

The *Miranda* rule generally bars unwarned statements taken during custodial interrogation from being introduced into evidence in the government's case-in-chief. This Court's cases, however, do not mandate that evidence that is the fruit of a statement obtained without *Miranda* warnings—such as respondent's firearm in this case—must be suppressed. To the contrary, the Court's decisions in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985), held that fruits of unwarned statements were admissible. Far from casting doubt on that conclusion, the Court's decision in *Dickerson* v. *United States*, 530 U.S. 428 (2000), expressly relied on the continuing validity of that principle, and it specifically rejected the contention that a broad fruits rule—such as that adopted by the court of appeals—should be applied in cases in which law enforcement agents fail to give a suspect *Miranda* warnings.

Before *Miranda*, in *Wong Sun* v. *United States*, 371 U.S. 471 (1963), this Court had held that evidence dis-

covered as a result of a search in violation of the *Fourth* Amendment constitutes the "fruit of the poisonous tree" and must be excluded from evidence. In *Tucker* and *Elstad*, however, the Court declined to apply the *Wong Sun* fruits doctrine to suppress evidence obtained as a result of statements made by a suspect who had not been given *Miranda* warnings. In *Tucker*, the Court held that the testimony of a witness who was discovered as a result of a statement obtained from a defendant who had not received complete *Miranda* warnings did not have to be suppressed as the fruit of the unwarned statement. 417 U.S. at 446-452. In *Elstad*, the Court held that a voluntary statement obtained from a defendant who had not been given *Miranda* warnings did not preclude admission of the defendant's later statement given after *Miranda* warnings, so long as the initial statement was voluntary. 470 U.S. at 317-318. The Supreme Court reasoned in *Elstad* that "a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the fruits doctrine." *Id.* at 306. The Court explained that "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion." *Id.* at 307. But "the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements *and their fruits* be discarded as inherently tainted." *Ibid.* (emphasis added). To the contrary, the Court concluded that *Tucker* "was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed" and stated that "this reasoning applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness [as in *Tucker*] nor an article of evidence but the accused's own voluntary testimony [as in *Elstad*]." *Id.* at 308.

In *Dickerson*, the Court held that the *Miranda* rule—that certain warnings must be given if a suspect's statements made during custodial interrogation are to be admitted in the government's case-in-chief—was a "constitutional decision" that could not be overruled by an Act of Congress, 18 U.S.C. 3501. 530 U.S. at 432. In reaching that conclusion, the Court referred specifically and approvingly to *Elstad*'s rejection of the *Wong Sun* fruits rule:

> Our decision in [*Elstad*]—*refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases*—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.

Id. at 441 (emphasis added).

Dickerson did not alter the settled law announced in *Elstad* that limited the scope of the *Miranda* exclusionary rule. Indeed, the doctrine of stare decisis was integral to the holding in *Dickerson*. 530 U.S. at 444 ("Following the rule of *stare decisis*, we decline to overrule *Miranda*."). The Court also placed critical reliance on the continuing validity of its post-*Miranda* cases, which include *Tucker* and *Elstad*. The Court explained that those cases had "reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Id.* at 443-444.

Dickerson thus preserved the distinction in this Court's cases between the rules limiting the admissi-

bility of unwarned statements in the government's case-in-chief and the rules permitting the admissibility of fruits of an unwarned statement. Aside from cases involving an exception, see *New York* v. *Quarles*, 467 U.S. 649 (1984), unwarned statements are inadmissible as evidence in the prosecution's case-in-chief. Under the principles of *Tucker* and *Elstad*, however, the fruits of those statements are admissible so long as the unwarned statement was voluntary. The court of appeals erred in reading *Dickerson* to undermine—rather than to reaffirm—this Court's past decisions under *Miranda*.

B. The Court Of Appeals Misunderstood The Rationale Of This Court's *Miranda* Decisions And The Teachings Of Those Decisions About The Scope Of The *Miranda* Exclusionary Rule

The court of appeals' error rested on two fundamental mistakes. First, the court believed that *Elstad* "drew a distinction between fruits consisting of a subsequent confession by the defendant after having been fully *Mirandized*," which need not be surpressed, and "fruits consisting of subsequently obtained 'inanimate evidentiary objects,'" which (it held) must be suppressed. App., *infra*, 16a. Although the court acknowledged that what it termed "dicta elsewhere in the opinion [in *Elstad*] has been cited for the contrary conclusion," the court stated that "*Elstad*'s holding indicates that the physical fruits of a *Miranda* violation are subject to the *Wong Sun* fruits doctrine." *Id.* at 17a. *Elstad*'s rationale, however, cannot be squared with that reasoning. While *Elstad* did note that the second statement in that case was the product of the suspect's "own volition," 470 U.S. at 308, *Elstad* more broadly rejected the proposition that the *Wong Sun* doctrine applies to the fruits of a statement obtained without

Miranda warnings. The Court reached that conclusion by explaining that while an "irrebuttable" presumption of coercion exists when the government seeks to introduce an unwarned statement in its case-in-chief, no such presumption exists to bar the admission of "the statements *and their fruits*" in other contexts. *Id.* at 307 (emphasis added).

Second, in fashioning its own exclusionary rule to bar the physical fruits of a statement obtained without *Miranda* warnings, the court of appeals misapplied this Court's teachings. In *Tucker* and *Elstad*, the Court identified two rationales for excluding evidence in the *Miranda* context—"deterring improper police conduct" and "assuring trustworthy evidence." *Elstad*, 470 U.S. at 308. See *Tucker*, 417 U.S. at 447-449. The court of appeals in this case, however, limited its consideration to the deterrence rationale, see App., *infra*, 26a-27a, and it misapplied that rationale by holding that the interest in deterring even negligent failures to issue *Miranda* warnings, as happened here, justifies exclusion of physical evidence. *Id.* at 27a, 31a.

Under a correct application of this Court's precedents, physical evidence, such as the gun seized in this case, undoubtedly constitutes reliable, trustworthy evidence. Thus, admitting it into evidence does not implicate *Miranda*'s concern to protect the truth-seeking process. Cf. *Withrow* v. *Williams*, 507 U.S. 680, 692 (1993) ("*Miranda* serves to guard against 'the use of unreliable statements at trial.'"). Rather, suppression of that physical evidence undermines the truth-seeking process. Nor do deterrence concerns justify suppressing not only the unwarned statement but also its fruits. Suppression of the statement itself in the government's case-in-chief is sufficient. Cf. *New York* v. *Quarles*, 467 U.S. 649, 669 (1984) (O'Connor, J., concurring) ("The

harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminations, and the suppression of such incriminations should by itself produce the optimal enforcement of the *Miranda* rule."). The court of appeals erred, therefore, in concluding that a failure to give *Miranda* warnings requires the suppression of physical evidence derived from an unwarned, but otherwise voluntary, statement made by a defendant.

C. The Decision Of The Court Of Appeals Conflicts With Recent Decisions Of The First, Third, and Fourth Circuits

The court of appeals' holding that a failure to give *Miranda* warnings requires the suppression of derivative physical evidence conflicts with the decisions of the three other courts of appeals that have also considered the impact of *Dickerson* on *Elstad* and *Tucker*. In direct conflict with the court's holding in this case, both the Third and Fourth Circuits have held, after *Dickerson*, that a failure to give *Miranda* warnings never requires the suppression of physical evidence derived from a defendant's unwarned but otherwise voluntary statement.

In *United States* v. *DeSumma*, 272 F.3d 176, 179-181 (2001), cert. denied, 122 S. Ct. 1631 (2002), the Third Circuit upheld the admission of a gun found as a result of a voluntary statement made by the defendant before he was given *Miranda* warnings. The court held that "the fruit of the poisonous tree doctrine does not apply to derivative evidence secured as a result of a voluntary statement obtained before *Miranda* warnings are issued." *Id.* at 180. Based on *Dickerson*'s discussion of *Elstad*, the Third Circuit concluded that *Dickerson* "continued to observe the distinction between

Miranda's application to cases involving the Fifth, rather than the Fourth, Amendment." *Id.* at 179.

In *United States* v. *Sterling*, 283 F.3d 216, 218-219, cert. denied, 122 S. Ct. 2606 (2002), the Fourth Circuit similarly upheld the admission of a gun found as a result of a voluntary statement made by the defendant before he was given *Miranda* warnings. The Fourth Circuit relied on its prior decision in *United States* v. *Elie*, 111 F.3d 1135, 1142 (1997), which had held that "derivative evidence obtained as a result of an unwarned statement that was voluntary under the Fifth Amendment is never 'fruit of the poisonous tree.'" The Fourth Circuit concluded in *Sterling* that "the distinction [drawn in *Tucker* and *Elstad*] between statements and derivative evidence survives *Dickerson*," 283 F.3d at 219, and that "*Dickerson* does not overrule *Tucker* or *Elstad*, and our holding in *Elie*, based on those two cases, survives." *Ibid.*

The court of appeals' holding that the failure to give *Miranda* warnings always requires the suppression of derivative physical evidence also conflicts with the First Circuit's decision in *United States* v. *Faulkingham*, 295 F.3d 85 (2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002). In that case, the First Circuit used a case-by-case approach that requires the suppression of derivative physical evidence only when the need for deterrence outweighs the reliability of the evidence in the particular case. The First Circuit in *Faulkingham* upheld the admission of drugs and the testimony of a witness discovered as a result of voluntary statements made by the defendant who was not given *Miranda* warnings. The First Circuit recognized that "[t]he various differences in purpose behind the Fourth and Fifth amendments, articulated in *Elstad*, continue unchanged by *Dickerson*, and those dif-

ferences affect the remedial options appropriate for violations of the two distinct constitutional amendments, and, more specifically, for violations of the *Miranda* rule." *Id.* at 93. (Contrary to the court of appeals' reading of *Faulkingham* in this case, the First Circuit clearly did not conclude in *Faulkingham* that "*Dickerson* alters the analysis regarding suppression of the fruits of a *Miranda* violation." App., *infra*, 29a.) The First Circuit went on to follow its pre-*Dickerson* decision in *United States* v. *Byram*, 145 F.3d 405 (1998), which had declined to adopt a flat rule that a failure to give *Miranda* warnings may never lead to the suppression of derivative evidence. *Faulkingham*, 295 F.3d at 90-91. The First Circuit held that suppression was unwarranted on the facts of *Faulkingham*, in which the officers in the heat of a fast-moving drug arrest had simply neglected to give *Miranda* warnings to an arrestee who volunteered information. The First Circuit ruled that the evidence should not be suppressed because, in those circumstances, "the reliability of the unwarned derivative evidence" outweighed "the need for deterrence." *Id.* at 93-94.*

* The defendant in *Faulkingham* has also filed a petition for a writ of certiorari (No. 02-7385), but this case presents a more suitable vehicle for resolution of the constitutional issue. Like the Third Circuit in *DeSumma* and the Fourth Circuit in *Sterling*, the First Circuit in *Faulkingham* concluded that this Court's decision in *Dickerson* did not change the law on whether the fruits of a statement obtained without *Miranda* warnings must be suppressed. The court of appeals in this case stands alone in concluding that "the premise upon which *Tucker* and *Elstad* relied was fundamentally altered in *Dickerson*." App., *infra*, 12a. Moreover, the result in this case—the suppression of evidence—is at odds with the results of the decisions of the other courts of appeals, while the result of the First Circuit's decision in *Faulkingham* is consistent with the results of the Third Circuit's decision in *DeSumma* and the Fourth Circuit's decision in *Sterling*. Accordingly, further review is appropriate in this case rather than *Faulkingham*, and the petition in *Faulkingham* should be held pending disposition of the petition in this case.

D. The Question Presented Is Important

The court of appeals' decision bears on an important issue in federal criminal law. In a variety of cases, officers, for one reason or another, may fail to deliver fully the warnings set forth in *Miranda*. Here, for example, the suspect himself cut off the officer's attempt to advise him of his *Miranda* rights, saying that he already knew his rights. In other cases, warnings may be omitted during a fast-moving investigation. The question whether *Miranda* requires exclusion not only of the suspect's unwarned statement but also its tangible fruits thus arises with some frequency. Cf. *Patterson* v. *United States*, 485 U.S. 922, 922-923 (1988) (White, J., dissenting from the denial of certiorari). Because the suppression of probative physical evidence in such cases imposes serious costs on the administration of justice, this Court's resolution of the conflict in the circuits is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-1503

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

SAMUEL FRANCIS PATANE, DEFENDANT-APPELLEE

Filed: Sept. 17, 2002

Before: EBEL, ANDERSON, and HENRY, Circuit Judges.

EBEL, Circuit Judge.

The Government appeals from the district court's order suppressing the physical evidence against Samuel Francis Patane on charges of gun possession by a felon. The district court based its suppression order on its conclusion that the evidence was insufficient to establish probable cause to arrest Patane. We conclude, contrary to the district court, that probable cause existed to arrest Patane. However, we affirm the district court's order on the alternative ground that the evidence must be suppressed as the physical fruit of a *Miranda* violation.

I. BACKGROUND

Patane was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. 922(g)(1). The district court held a suppression hearing at which the police investigation leading to discovery of the gun was detailed. Ruling from the bench a week later, the court granted defendant's motion to suppress. Patane's arrest resulted from the intersection of two essentially independent investigations—one by Colorado Springs Detective Josh Benner regarding Patane's gun possession, and another by Colorado Springs Officer Tracy Fox regarding Patane's violation of a domestic violence restraining order.

The story begins when Patane was arrested for harassing and menacing his ex-girlfriend, Linda O'Donnell. He was released on bond from the El Paso, Colorado county jail on June 3, 2001, subject to a temporary restraining order. The restraining order is not in the record, but uncontroverted testimony indicates that it forbade Patane to contact O'Donnell, in person or by phone, directly or indirectly, in the 72 hours after his release on bond.

On June 6, an agent with the federal Bureau of Alcohol, Tobacco, and Firearms telephoned Detective Benner, a member of a local police drug interdiction unit that worked closely with the ATF. The agent said that a county probation officer had told him that Patane was a convicted felon who also had been convicted on a domestic violence charge, and that Patane possessed a Glock .40 caliber pistol. The record does not reveal how the probation officer knew that Patane had the gun. Detective Benner called O'Donnell to inquire about the

gun, and she told him that Patane had the pistol with him at all times.

Seemingly by coincidence, at the moment Benner called O'Donnell to ask about the gun, Officer Fox had arrived at O'Donnell's residence, responding to a call from O'Donnell about an alleged violation of the restraining order. O'Donnell told Officer Fox that two days earlier, O'Donnell received a hang-up call. Using the *69 feature on her telephone, O'Donnell learned that the call originated from a number that O'Donnell recognized as Patane's home telephone. This call violated Patane's restraining order, O'Donnell stated, and she showed Officer Fox a copy of the order. O'Donnell said that she was afraid for her safety, that she knew Patane regularly had a gun, and that Patane kept a list of people he wanted to kill. Officer Fox confirmed by computer that a restraining order had been issued.

Officer Fox did not confirm O'Donnell's use of the call tracing, although she had done so in a prior, unrelated case and thus was aware it was possible. Neither Officer Fox nor Detective Benner ran a criminal background check on O'Donnell prior to Patane's arrest, which Patane asserts would have revealed that O'Donnell was herself out on bond for carrying a concealed weapon, criminal trespass, theft, and criminal damage.

Detective Benner and Officer Fox then spoke by phone. Officer Fox said she planned to arrest Patane for violating the restraining order by calling O'Donnell, and the two arranged to go to Patane's house. Officer Fox knocked on the door while Detective Benner went out back in case Patane attempted to flee. The woman who answered the door summoned Patane. Officer Fox asked Patane to step outside, which he did. She asked him about the hang-up call, and Patane denied having

made the call or having contacted O'Donnell in any way. Officer Fox told Patane that he was under arrest and handcuffed him shortly afterward.

With Patane arrested and handcuffed, Detective Benner emerged from the back of the house and approached Patane. Detective Benner began advising Patane of his *Miranda* rights, but only got as far as the right to silence when Patane said that he knew his rights. No further *Miranda* warnings were given, a fact which the Government concedes on appeal resulted in a *Miranda* violation. Detective Benner told Patane he was interested in what guns Patane owned. Patane replied, "That .357 is already in police custody." Detective Benner said, "I am more interested in the Glock." Patane said he was not sure he should tell Detective Benner about the Glock pistol because he did not want it taken away. Detective Benner said he needed to know about it, and Patane said, "The Glock is in my bedroom on a shelf, on the wooden shelf." Detective Benner asked for permission to get the gun, which Patane granted, and Detective Benner went inside, found the gun where Patane described, and seized it. Detective Benner then told Patane, as the detective later testified, that "I wasn't going to arrest him for the gun at this time because I wanted to do some more investigations." Officer Fox took Patane to the police station and booked him for violating the restraining order.

The next day, Detective Benner met with Patane's probation officer and verified that Patane had a prior felony conviction for drug possession as well as a misdemeanor third degree assault conviction.

II. PROBABLE CAUSE

On appeal, the Government argues that the district court erred in concluding that the police lacked probable cause to arrest Patane for violating the domestic violence restraining order. We agree with the Government.

In reviewing the district court's probable cause determination, "we consider the evidence in a light most favorable to the district court's legal determinations, and review the court's findings of historical fact for clear error. Absent any finding of fact, we will uphold the court's legal determination if any reasonable view of the evidence supports it. We review the ultimate determinations of reasonable suspicion to stop and probable cause to arrest de novo." *United States* v. *Treto-Haro*, 287 F.3d 1000, 1002 (10th Cir. 2002) (citations omitted). We have articulated the substantive probable cause standard as follows:

> An officer has probable cause to arrest if, under the totality of the circumstances, he learned of facts and circumstances through reasonably trustworthy information that would lead a reasonable person to believe that an offense has been or is being committed by the person arrested. Probable cause does not require facts sufficient for a finding of guilt; however, it does require more than mere suspicion.

United States v. Morris, 247 F.3d 1080, 1088 (10th Cir. 2001) (internal quotation marks and citations omitted).

The district court's ruling that no probable cause existed to arrest Patane for violating the domestic violence restraining order was based on its view that domestic disputes often involve "claims and counterclaims

. . . thrown between people who have separated some sort of an intimate relationship," and therefore that uncorroborated allegations arising from such disputes are "just inadequate" to establish probable cause. Unexplored avenues of corroboration noted by the court were: the failure to check telephone records to confirm O'Donnell's allegation that a call had been placed from Patane's residence to hers during the time frame covered by the restraining order, "verification which presumably could have been done rather easily," the failure to investigate O'Donnell's credibility prior to the arrest, the failure to corroborate O'Donnell's accusations apart from Detective Benner's confirmation that Patane indeed possessed a gun, which "has nothing to do with the crime for which he was arrested," and the failure to determine whether persons other than Patane had access to Patane's telephone. The court also noted that "[i]t's just one contact which . . . could, in my life experience, have been an innocent mistake" because "people do make calls to numbers with which they are familiar, not intending to make the call," that Patane denied having contacted O'Donnell, and that O'Donnell delayed two days in reporting the call to the police.

We reject any suggestion that victims of domestic violence are unreliable witnesses whose testimony cannot establish probable cause absent independent corroboration. We have stated, "when examining informant evidence used to support a claim of probable cause for a . . . warrantless arrest, the skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim or ordinary citizen witness." *Easton v. City of Boulder*, 776 F.2d 1441, 1449 (10th Cir. 1985); *see also*

Guzell v. Hiller, 223 F.3d 518, 519-20 (7th Cir. 2000) ("Police are entitled to base an arrest on a citizen complaint . . . of a victim . . . without investigating the truthfulness of the complaint, unless . . . they have reason to believe it's fishy." (citations omitted)). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.4(a), at 209-11 (3d ed. 1996) (noting that "[b]y far the prevailing view" is that corroboration is not essential in victim-witness cases, and arguing "that when an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such may not be the case").

We find no basis for the suggestion that domestic violence victims are undeserving of the presumption of veracity accorded other victim-witnesses. Indeed, our decision in *Easton* forecloses such a position. In *Easton*, probable cause to arrest for child molestation was based on the accusations of two child witnesses, one five years old and the other three years old. We rejected as "an entirely unacceptable point of view" the argument that the children's testimony was suspect, stating:

> In a great many child molestation cases, the only available evidence that a crime has been committed is the testimony of children. To discount such testimony from the outset would only serve to discourage children and parents from reporting molestation incidents and to unjustly insulate the perpetrator of such crimes from prosecution.

Easton, 776 F.2d at 1449.[1] A strict corroboration requirement in domestic violence cases would create precisely the same proof problems we found dispositive in *Easton*.

In this case, neither the district court nor Patane point to any evidence in the record suggesting that O'Donnell lied about the purported hang-up call out of personal animosity against Patane arising from their failed relationship, let alone that the police were aware of such evidence at the time of arrest. For example, there was no evidence that O'Donnell had threatened to lie in such a manner, or that she had lied in such a manner in the past. To the contrary, there was evidence that Patane recently had been arrested for harassing and menacing O'Donnell after he threatened to kill her, that O'Donnell knew that Patane carried a gun and kept a list of persons (including police officers) he wanted to kill, and that O'Donnell feared that Patane would kill her. Admittedly, O'Donnell waited two days before reporting the hang-up call, a fact that could cast some doubt on the veracity of her report. However, we do not believe that fact alone was sufficient to require the officers to treat her complaint with special skepticism.

In any event, we note that the officers here did corroborate O'Donnell's veracity in two respects. First, the district court found as fact that, prior to the arrest, Detective Benner had learned from a probation officer that Patane possessed a gun. Second, Officer Fox verified that a restraining order had been issued against

[1] We noted in *Easton* that the accusations of the children contained "significant" discrepancies, and even noted the possibility that their testimony would be inadmissible in court due to an inability to understand the oath, yet we held that the children's accusations established probable cause. 776 F.2d at 1449-50.

Patane. The mere fact that further corroboration was possible is not dispositive of whether the information available would lead a reasonable person to believe that an offense had been committed.

At oral argument, Patane argued that, as a matter of law, a single hang-up phone call could not constitute a violation of the restraining order. We disagree. As noted above, the evidence showed that the restraining order forbade Patane to contact O'Donnell, directly or indirectly, in person or by telephone, and counsel for Patane conceded that multiple hang-up phone calls would amount to a violation of the restraining order. We find no basis to conclude that a single call is not "contact" with the victim, or that a single call does not implicate the same concerns about intimidation and harassment that multiple calls would. *Cf.* 42 U.S.C. § 376hh(a), (b)(1) ("encourag[ing] States . . . to treat domestic violence as a serious violation of criminal law" by authorizing Attorney General to make grants to implement "mandatory arrest or proarrest programs and . . . policies for protection order violations"). We acknowledge that it is conceivable that a single hang-up call might result from careless rather than willful behavior. However, probable cause does not require certainty of guilt or even a preponderance of evidence of guilt, but rather only reasonably trustworthy information that would lead a reasonable person to believe an offense was committed. *Morris*, 247 F.3d at 1088. The possibility that the hang-up call here was accidental does not defeat probable cause.

Accordingly, we conclude that Patane's arrest was supported by probable cause to believe that Patane had violated the domestic violence restraining order.[2]

III. SUPPRESSION OF THE PHYSICAL FRUITS OF A *MIRANDA* VIOLATION

Our conclusion that the district court erroneously based suppression of the gun on the absence of probable cause to arrest does not end our inquiry. Patane argues that suppression of the gun should be affirmed because, even if the arrest was proper, the ensuing *Miranda* violation independently requires suppression of the physical evidence.

The district held, and the Government concedes on appeal, that a *Miranda* violation occurred when the police questioned Patane about his possession of a gun without administering the complete *Miranda* warnings.

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[2] In light of our conclusion that the officers had probable cause to arrest for violation of the restraining order, it is unnecessary to reach the Government's alternative argument that the arrest was justified by probable cause to believe that Patane was a felon in possession of a gun. The district court declined to decide whether the officers had probable cause to arrest on the basis of Patane's gun violation. ("[T]o allow the arresting officers after the fact to go back and scramble . . . for evidence that might justify an arrest on another charge . . . would not be a good rule to establish . . . ."). On appeal, the Government argued that this reasoning is foreclosed by *United States* v. *Santana-Garcia*, 264 F.3d 1188, 1192-93 (10th Cir. 2001) (officer's subjective belief as to non-existence of probable cause not dispositive); *see also Treto-Haro*, 287 F.3d at 1006 (same). Patane correctly conceded that the district court's reasoning was erroneous in light of our precedent, and on appeal he argued only that the officers lacked probable cause to believe that he was a felon in possession of a gun. The district court did not reach this issue, and we decline to do so in the first instance on appeal.

As explained above, this questioning led Patane to admit that he possessed a gun in his bedroom, which admission in turn led immediately to seizure of the gun. The Government correctly concedes that Patane's admissions in response to questioning were inadmissible under *Miranda* but argues that the physical fruit of the *Miranda* violation—the gun—is admissible.

The district court determined that it was unnecessary to decide whether the physical fruits of a *Miranda* violation must be suppressed because it had concluded that the underlying arrest that led to the confession was unconstitutional. Because we have reversed the conclusion that the arrest was unconstitutional, we are now squarely presented with the issue whether the gun should be suppressed in any event because it was obtained as the fruits of an unconstitutionally obtained confession. This issue was fully briefed and presented below and it is again fully briefed on appeal. Resolution of this issue involves our answering a purely legal question (i.e., whether the physical fruits of a *Miranda* violation must be suppressed), a question that potentially would render remand and further proceedings unnecessary. Thus, we now turn to that issue. *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001). Below, we conclude that the physical evidence that was the fruit of the *Miranda* violation in this case must be suppressed.

A. Supreme Court precedent

The Government relies primarily on two Supreme Court cases for its argument that the fruits doctrine does not apply to *Miranda* violations: *Michigan v. Tucker*, 417 U.S. 433, 445-46, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974), and *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). Both cases, it is true, declined to apply the fruits of the poisonous tree

doctrine of *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), to suppress evidence obtained from an un-Mirandized confession. However, both cases were predicated upon the premise that the *Miranda* rule was a prophylactic rule, rather than a constitutional rule. *Elstad*, 470 U.S. at 305, 105 S. Ct. 1285 ("The prophylactic *Miranda* warnings are not themselves rights protected by the Constitution . . . .'" (quoting *New York v. Quarles*, 467 U.S. 649, 654, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984)) (internal quotation marks omitted)); *id.* at 308, 105 S. Ct. 1285 ("Since there was *no* actual *infringement* of the suspect's *constitutional rights*, [*Tucker*] was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed." (emphasis added)); *Tucker*, 417 U.S. at 445-46, 94 S. Ct. 2357 (distinguishing *Wong Sun* because "the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege"). Because *Wong Sun* requires suppression only of the fruits of *unconstitutional* conduct, the violation of a prophylactic rule did not require the same remedy.

However, the premise upon which *Tucker* and *Elstad* relied was fundamentally altered in *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). In *Dickerson*, the Supreme Court declared that *Miranda* articulated a constitutional rule rather than merely a prophylactic one. *Id.* at 444, 86 S. Ct. 1602 ("*Miranda* announced a constitutional rule that Congress may not supersede legislatively."); *see id.* at

432, 438, 440, 86 S. Ct. 1602. Thus, *Dickerson* undermined the logic underlying *Tucker* and *Elstad*.

Additionally, a close reading of *Tucker* and *Elstad* reveals other distinctions that lead us to conclude that those cases should not be given the sweeping reading the Government is asserting. We examine each decision below.

Tucker involved an un-*Mirandized* custodial interrogation that occurred prior to the issuance of the *Miranda* decision.[3] During the course of the interrogation, the defendant identified a relevant witness of whom the police previously had been ignorant. The defendant argued before the Court that the testimony of the witness so identified by the defendant should have been barred as the fruit of the *Miranda* violation. The Court's rejection of this argument rested largely on its conclusion that excluding the fruits of this confession would have minimal prophylactic effect because the officers were acting in complete good faith under prevailing pre-*Miranda* law that barred only coerced confessions. After noting in the opening paragraph of the opinion that the interrogation took place prior to *Miranda*, *Tucker*, 417 U.S. at 435, 94 S. Ct. 2357, the Court explained:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right . . . . Where the official action was pursued in complete

[3] *Miranda* nonetheless applied because it was issued prior to Tucker's trial. In fact, the defendant received all the warnings later incorporated into the Miranda requirements except for the advice that he could receive free counsel if he was indigent.

good faith, however, the deterrence rationale loses much of its force.

We consider it significant to our decision in this case that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in *Miranda*. *Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the Miranda rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground.* For at the time respondent was questioned these police officers were guided, quite rightly, by the principles established in *Escobedo v. Illinois* . . . .

Id. at 447, 94 S. Ct. 2357 (emphasis added, footnote omitted). The Court then noted that no coercion rendered the challenged testimony unreliable. *Id.* at 449, 94 S. Ct. 2357.

The other Supreme Court case offered by the Government to support its argument is *Elstad*, 470 U.S. at 306, 105 S. Ct. 1285. In *Elstad*, the defendant made incriminating statements while in custodial interrogation prior to the issuance of *Miranda* warnings. The police then administered *Miranda* warnings, and thereafter the defendant made further incriminating statements. The issue in *Elstad* was whether the defendants post-*Mirandized* statements must be suppressed as the fruit of the earlier *Miranda* violation. *Id.* at 303, 105 S. Ct. 1285. The Supreme Court held that suppression was not required, rejecting the view that the post-warning statements were the unconstitutional product of "a subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat

out of the bag." *Id.* at 311, 105 S. Ct. 1285. After repeating the now-suspect reasoning that a *Miranda* violation was not necessarily a constitutional violation and thus not controlled by the fruits doctrine of *Wong Sun*, the Court stated:

> [T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted . . . . .
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> . . . . In deciding how sweeping the judicially imposed consequences of a failure to administer *Miranda* warnings should be, the *Tucker* Court noted that neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the witness' testimony. The unwarned confession must, of course, be suppressed, but the Court ruled that introduction of the third-party witness' testimony did not violate Tucker's Fifth Amendment rights.

We believe that this reasoning applies with equal force when the alleged "fruit" of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony. As in *Tucker*, the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule. Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities. The Court has often noted: *A living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized.* The living witness is an in-

> dividual human personality whose attributes of will, perception, memory and *volition* interact to determine what testimony he will give.

Id. at 307-09, 105 S. Ct. 1285 (first emphasis added, alterations and internal quotation marks omitted). *Elstad* thus drew a distinction between fruits consisting of a subsequent confession by the defendant after having been fully Mirandized and fruits consisting of subsequently obtained "inanimate evidentiary objects." *Id.* at 309, 105 S. Ct. 1285. A subsequent, Mirandized confession need not be excluded because it is the product of "*volition*," willingly offered up by a defendant who already had been made aware of his *Miranda* rights. *Id.* By implication, "inanimate evidentiary objects" would be excludable, because physical evidence derived from the defendant's un-Mirandized statement is not the product of volition after a defendant has been Mirandized properly.[4] *See id.* at 347 n. 29, 105 S. Ct.

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[4] *See also Orozco* v. *Texas*, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969). In *Orozco*, the officers interrogated a suspect in custody without giving *Miranda* warnings, learning that the suspect owned a gun and where it was located. *Id.* at 325, 89 S. Ct. 1095. Ballistics tests of the gun indicated that it had been used to commit a murder. *Id.* In a terse holding, the Court held that "*the use* of these admissions obtained in the absence of the required warnings was a flat violation of the Self Incrimination Clause of the Fifth Amendment as construed in *Miranda*." *Id.* at 326, 89 S. Ct. 1095 (emphasis added). The Court did not expressly consider whether the gun and the ballistics evidence would be admissible on remand. However, one plausible reading of *Orozco* is that the reference to the unconstitutional "use" of the statements includes their use by police officers in obtaining the gun, as well as their introduction of the admission at trial.

This reading of *Orozco* is reinforced by the Court's subsequent opinion in *Kastigar* v. *United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). *Kastigar* noted that the privilege against

1285 (Brennan, J., dissenting) ("[T]oday's opinion surely ought not be read as also foreclosing application of the traditional derivative-evidence presumption to physical evidence obtained as a proximate result of a *Miranda* violation. The Court relies heavily on individual 'volition' as an insulating factor in successive-confession cases . . . . [This] factor is altogether missing in the context of inanimate evidence." (citation omitted)).[5]

While the reasoning regarding volition in *Elstad*'s holding indicates that the physical fruits of a *Miranda* violation are subject to the *Wong Sun* fruits doctrine, we acknowledge that dicta elsewhere in the opinion has been cited for the contrary conclusion. *See Elstad*, 470 U.S. at 307, 105 S. Ct. 1285 ("[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecu-

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self-incrimination "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used," *id.* at 445, 92 S. Ct. 1653, and that "immunity from use and derivative use is coextensive with the scope of the privilege," *id.* at 453, 92 S. Ct. 1653. Indeed, in *Miranda* itself the Court stated that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence obtained as a result of interrogation* can be used against him." 384 U.S. 436, 454, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (emphasis added).

[5] There is a substantial argument that *Elstad* ought not even be treated as a case involving application of the *Wong Sun* fruits doctrine in the first place, for precisely the reasons emphasized by *Elstad* in its volition discussion. In rejecting the argument that the second confession was the result of some "subtle form of lingering compulsion," *id.* at 311, *Elstad* in effect concluded that the second confession was not evidence "obtained . . . as a direct result" of the *Miranda* violation. *Wong Sun*, 371 U.S. at 485, 83 S. Ct. 407. In other words, the post-Mirandized confession in *Elstad* was admitted *because* it *was not* (rather than *despite* the fact that it *was*) the fruit of the poisonous tree.

tion's case in chief, does not require that the statements and their fruits be discarded as inherently tainted."); *Id.* at 308, 105 S. Ct. 1285 (stating that *Tucker*'s reasoning "applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony").[6] These passages, in contrast to the volition discussion, provide only ambiguous support for the position for which they are cited. To the extent they do address the admissibility of the physical fruits of a *Miranda* violation rather than a subsequent Mirandized confession, they are dicta not part of the reasoning of the holding.

In any event, we do not suggest that the holding in *Elstad* relying on volition definitively establishes that the physical fruits of a *Miranda* violation must be suppressed. Rather, the essential point for our analysis is only that *Elstad* does not definitively establish the contrary rule. We think Justice White most accurately summarized the relevance of *Elstad* and *Tucker* to the issue of suppression of the physical fruits of a *Miranda* violation:

> In *Michigan v. Tucker*, this Court expressly left open the question of the admissibility of physical evidence obtained as a result of an interrogation

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[6] We also recognize that Justice O'Connor argued that the physical fruits of a *Miranda* violation were not subject to *Wong Sun* suppression in her pre-*Elstad* concurrence in *New York* v. *Quarles*, 467 U.S. 649, 665-72, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part). As explained above, this argument was not adopted by the Court in *Elstad* or in any subsequent opinion of the Court. Justice O'Connor joined the majority opinion in *Dickerson*.

> conducted contrary to the rules set forth in *Miranda v. Arizona*. Since that time, the state and federal courts have been divided on this question. Indeed, in *Massachusetts v. White*, 439 U.S. 280, 99 S. Ct. 712, 58 L. Ed. 2d 519 (1978), this Court was evenly divided on the issue of the admissibility of physical evidence obtained from an interrogation that violated *Miranda*.
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> . . . .
>
> While *Elstad* has been considered illuminating by some Courts of Appeals on the question of admissibility of physical evidence yielded from a *Miranda* violation, that decision did not squarely address the question presented here, and in fact, left the matter open.

Patterson v. United States, 485 U.S. 922, 922-23, 108 S. Ct. 1093, 99 L. Ed. 2d 255 (1988) (White, J., dissenting from denial of certiorari) (footnotes and citations omitted).

It is true that, prior to *Dickerson*, the Tenth Circuit applied *Tucker* and *Elstad* to the physical fruits of a *Miranda* violation and concluded that suppression was not required because "[w]here the uncounseled statement is voluntary . . . there is no fifth amendment violation and the fruits may be admissible." *United States v. McCurdy*, 40 F.3d 1111, 1117 (10th Cir. 1994) (internal quotations omitted). However, once again *Dickerson* has undercut the premise upon which that application of *Elstad* and *Tucker* was based because *Dickerson* now concludes that an un-Mirandized statement, even if voluntary, is a Fifth Amendment violation. *Dickerson*, 530 U.S. at 444, 120 S. Ct. 2326.

Accordingly, we reject the Government's position that *Tucker* and *Elstad* foreclose suppression of the physical fruits of a *Miranda* violation.

B. Lower court approaches

Courts applying *Dickerson* have split on the proper application of *Wong Sun* to the physical fruits of a *Miranda* violation. The Third and Fourth Circuits have ruled that the physical fruits of a *Miranda* violation never are subject to *Wong Sun* suppression. *United States v. Sterling*, 283 F.3d 216, 218-19 (4th Cir. 2002), cert. denied, — U.S. —, 122 S. Ct. 2606, 153 L. Ed. 2d 792 (2002); *United States v. DeSumma*, 272 F.3d 176, 180-81 (3d Cir. 2001), cert. denied, — U.S. — , 122 S. Ct. 1631, 152 L. Ed. 2d 641 (2002); *United States v. Newton*, 181 F. Supp. 2d 157, 179-81 & n.16 (E.D.N.Y. 2002); *accord Taylor v. State*; 274 Ga. 269, 553 S.E.2d 598, 605 (2001) *State v. Walton*, 41 S.W.3d 75, 88-90 (Tenn. 2001); *cf. Abraham v. Kansas*, 211 F. Supp. 2d 1308, 1323 (D. Kan. July 2002) (holding that "[a]lthough the Court's holding in *Dickerson* seems to have altered this general rule [that fruits of a *Miranda* violation need not be suppressed]," the state court's failure to suppress physical fruits was not an "unreasonable application of federal law" under 28 U.S.C. § 2254(d)(1)); *Worden v. McLemore*, 200 F. Supp. 2d 746, 752-53 (E.D. Mich. 2002) (holding that state court's failure to suppress physical fruits of *Miranda* violation was not an unreasonable application of clearly established federal law because of "disagreement and confusion" among courts regarding application of *Dickerson*). The First Circuit, by contrast, has ruled that the physical fruits of a *Miranda* violation must be suppressed in certain circumstances, depending on the need for deterrence of police misconduct in light of the circumstances of each

case. *United States v. Faulkingham*, 295 F.3d 85, 90-94 (1st Cir. 2002). Below, we analyze the merits of each of these approaches. We conclude that the First Circuit is correct that the physical fruits of a violation must be suppressed where necessary to serve *Miranda*'s deterrent purpose. However, we part company with the First Circuit in the application of that standard, because we conclude that *Miranda*'s deterrent purpose requires suppression of the physical fruits of a negligent *Miranda* violation. We therefore conclude that suppression of the gun in the present case was appropriate.

1. Sterling & DeSumma

The Third and Fourth Circuits have concluded that the fruits doctrine simply does not apply to *Miranda* violations even after *Dickerson*. *United States v. Sterling*, 283 F.3d 216, 218-19 (4th Cir. 2002) cert. denied, *United States v. DeSumma*, 272 F.3d 176, 180-81 (3d Cir. 2001), cert. denied, — U.S. — , 122 S. Ct. 1631, 152 L. Ed. 2d 641 (2002). Both of these cases held that the physical fruits of a *Miranda* violation were admissible. *Sterling*, 283 F.3d at 219 (shotgun found in vehicle as a result of *Miranda* violation); *DeSumma*, 272 F.3d at 180-81 (gun found in vehicle as a direct result of *Miranda* violation). Both *Sterling* and *DeSumma* relied on substantially the same reasoning, focusing primarily on an isolated passage in *Dickerson*. *Dickerson* noted at the outset of the opinion that "*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts." 530 U.S. at 432, 120 S. Ct. 2326. Later in the opinion, in the course of rejecting various arguments supporting the erroneous view that

Miranda was not a constitutional decision, the Court stated:

> The Court of Appeals also noted that in *Oregon v. Elstad* we stated that "[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself." Our decision in that case—refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are *different* from unwarned interrogation under the Fifth Amendment.

Dickerson, 530 U.S. at 441, 120 S. Ct. 2326 (emphasis added, citations and internal quotations omitted).

Both *Sterling* and *DeSumma* viewed this language as amounting to an endorsement of the rule that the *Wong Sun* exclusionary rule does not apply to the physical fruits of a *Miranda* violation. *Sterling*, 283 F.3d at 219; *Desumma*, 272 F.3d at 180. *Sterling* explained:

> Although *Dickerson* held *Miranda* to be with Constitutional significance, *Miranda* only held that certain warnings must be given before a suspect's *statements* made during custodial interrogation can be admitted into evidence. In addition, we are of opinion that the Court's reference to and reaffirmation of *Miranda*'s progeny indicates that the established exceptions, like those in *Tucker* and *Elstad*, survive. Thus, the distinction between statements and derivative evidence survives *Dickerson*. In fact, *Dickerson* reiterated the distinction made in *Elstad* by stating that: "Our decision in that case—refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."

283 F.3d at 219 (emphasis in original, citation omitted).

There are at least two serious problems with the reasoning in *DeSumma* and *Sterling*. First, we respectfully disagree with their conclusion that *Dickerson*'s reference to the controlling force of "*Miranda* and its progeny in this Court" forecloses the argument that the physical fruits of a *Miranda* violation may be suppressed. Although we agree that, based on this language, the holdings of *Elstad* and *Tucker* survive *Dickerson*, neither *Elstad* nor *Tucker* involved the physical fruits of a *Miranda* violation; as explained above, *Elstad* expressly contrasted the subsequent confession it found admissible from physical fruits, while *Tucker* expressly limited its holding to pre-*Miranda* interrogations. *See Patterson*, 485 U.S. at 922-24, 108 S. Ct. 1093 (White, J., dissenting from denial of certiorari). By wholly undermining the doctrinal foundation upon which those holdings were built, *Dickerson* effectively left *Elstad* and *Tucker* standing but prevented lower courts from extending their holdings. Of course, prior to *Dickerson* many *lower* courts (including this one) already had expanded the holdings of *Elstad* and *Tucker* by concluding that *Miranda* violations do not require suppression of physical fruits, but *Dickerson* explicitly limited its saving language to *Miranda*'s "progeny in *this* Court." 530 U.S. at 432, 120 S. Ct. 2326 (emphasis added). Far from endorsing pre-*Dickerson* lower court

case law, then, *Dickerson* instead signaled the contrary view.

The second fundamental problem with the reasoning in *DeSumma* and *Sterling* is that the language that they rely on for the proposition that *Dickerson* endorsed the extension of *Elstad* to physical fruits in fact said only that *Elstad* "recognizes . . . that unreasonable searches under the Fourth Amendment are *different* from unwarned interrogation under the Fifth Amendment." 530 U.S. at 441, 120 S. Ct. 2326 (emphasis added). The critical question, of course, is *how* the two are different. At oral argument in the present case, the Government argued only that the way that Fourth Amendment violations differ from Fifth Amendment violations is that the *Wong Sun* fruits doctrine applies to the former and not the latter. This argument already has been rejected by the Supreme Court. *Nix v. Williams*, 467 U.S. 431, 442 & n.3, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984) (noting that the Court has applied the fruits doctrine to violations of the Fifth Amendment, citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964)); *Kastigar v. United States*, 406 U.S. 441, 460-61, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). Although *Dickerson* itself does not explain how searches under the Fourth Amendment are "different," *Elstad* does just that: "a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a *broad* application of the 'fruits' doctrine." 470 U.S. at 306, 105 S. Ct. 1285 (emphasis added).[7] This language indicates that *Miranda* violations are "different" because a *narrowed* application of the fruits doctrine applies to *Miranda* violations, not because the fruits doctrine does not apply at all. *Cf. id.* at 306, 105 S. Ct. 1285 (referring to "[t]he *Miranda* exclusionary rule").

[7] *Elstad* also stated that a second way that Fourth Amendment violations are different from *Miranda* violations is that only the former are constitutional violations. 470 U.S. at 305-07, 105 S. Ct. 1285. This difference, of course, is one that *Dickerson* itself rejects.

Of course, *Elstad*'s explanation of how application of the fruits doctrine is "different" in *Miranda* cases begs the question of what a "broad" application means. We conclude that the broad application of the fruits doctrine is that defined in *Nix*: "the prosecution is not to be put in a better position than it would have been in if no illegality had transpired." 467 U.S. at 443, 104 S. Ct. 2501. Application of the fruits doctrine in the *Miranda* context is not "broad" because a number of exceptions to this pure rule have been recognized, circumstances where the prosecution is permitted to benefit from the *Miranda* violation. *See Elstad*, 470 U.S. at 314, 105 S. Ct. 1285; *Tucker*, 417 U.S. at 447-48, 94 S. Ct. 2357; *New York v. Quarles*, 467 U.S. 649, 657, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984) (unwarned answers "to questions in a situation posing a threat to the public safety" may be used); *Harris v. New York*, 401 U.S. 222, 225-26 & n.2, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (unwarned statements may be used for impeachment on cross-examination).

One could argue that further narrowing of the pure fruits doctrine in the context—narrowing beyond that already effectuated by the holdings of *Elstad* and *Tucker*[8]—also is appropriate. However, we are unper-

[8] *Tucker*'s narrowing would seem no longer applicable because it appeared to establish an exception only for questioning that predated *Miranda* itself. *Elstad*'s narrowing would still have applica-

suaded that the additional narrowing articulated in *DeSumma* and *Sterling* (refusing to apply the fruits exclusion to physical evidence obtained as a result of the illegally obtained confession) reflects a correct understanding of the way in which *Miranda* violations are, in *Dickerson*'s words, "different" from Fourth Amendment violations.

A blanket rule barring application of the fruits doctrine to the physical fruits of a *Miranda* violation would mark a dramatic departure from Supreme Court precedent. The Court consistently has recognized that deterrence of police misconduct, whether deliberate or negligent, is the fundamental justification for the fruits doctrine. *Nix*, 467 U.S. at 442-43, 104 S. Ct. 2501 ("The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections."); *see also Elstad*, 470 U.S. at 308, 105 S. Ct. 1285 (identifying trustworthiness and deterrence as the two rationales for a broad fruits suppression rule); 417 U.S. at 447, 94 S. Ct. 2357 (noting "the deterrent purpose of the exclusionary rule"). The Court also has been consistent in narrowing the scope of the fruits doctrine in the context only where deterrence is not meaningfully implicated. *See Elstad*, 470 U.S. at 308-09, 105 S. Ct. 1285 (stating that admission of voluntary post-warning statements will not undercut deterrence because the suspect remains "free to exercise his own volition in deciding whether or not to make a [post-

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bility today because it declined to apply the fruits exclusion to a subsequent voluntary confession rendered after the warnings are given.

warning] statement to the authorities"); *Tucker*, 417 U.S. at 447-48, 94 S. Ct. 2357 (explaining that the "deterrence rationale loses much of its force" in that case because the unwarned interrogation occurred prior to *Miranda*'s issuance).

In sharp contrast with *Elstad* and *Tucker*, however, the rule argued for by the Government here risks the evisceration of the deterrence provided by the fruits doctrine, as this case well illustrates. As a practical matter, the inability to offer Patane's statements in this case affords no deterrence, because the ability to offer the physical evidence (the gun) renders the statements superfluous to conviction. *See generally United States v. Kruger*, 151 F. Supp. 2d 86, 101-02 (D. Me. 2001) ("The exclusion of the cocaine, the substance—indeed essence—of the suppressed statements, is necessary to deter law enforcement officers from foregoing the administration of *Miranda* warnings . . . . "), *overruled by Faulkingham*, 295 F.3d at 92-94; Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 *Mich. L. Rev.* 929, 933 (1995) ("Unless the courts bar the use of the often-valuable evidence derived from an inadmissible confession, as well as the confession itself, there will remain a strong incentive to resort to forbidden interrogation methods."); David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 *Ohio St. L. J.* 805, 843-48 (1992) ("Police officers seeking physical evidence are not likely to view the loss of an unwarned confession as particularly great when weighed against the opportunity to recover highly probative nontestimonial evidence, such as a murder weapon or narcotics."). The present case is hardly anomalous in this respect, as demonstrated by the multitude of reported

cases where the record demonstrated that the interrogating authorities intentionally (and in some cases pursuant to official policy and training) violated a suspect's *Miranda* rights in order to procure derivative evidence. *E.g.*, *United States v. Orso*, 234 F.3d 436, 441 (9th Cir. 2000) *aff'd in part, rev'd in part*, 266 F.3d 1030 (9th Cir. 2001) (en banc); *Henry v. Kernan*, 197 F.3d 1021, 1026, 1028 (9th Cir. 1999); *Pope v. Zenon*, 69 F.3d 1018, 1023-24 (9th Cir. 1995), *overruled by Orso*, 266 F.3d 1030; *Cooper v. Dupnik*, 963 F.2d 1220, 1224-27 (9th Cir. 1992); *United States v. Carter*, 884 F.2d 368, 373 (8th Cir. 1989); *United States v. Esquilin*, 42 F. Supp. 2d 20, 33 (D. Me. 1999), *aff'd*, 208 F.3d 315 (1st Cir. 2000).

Further, the rule urged upon us by the Government appears to make little sense as a matter of policy. From a practical perspective, we see little difference between the confessional statement "The Glock is in my bedroom on a shelf," which even the Government concedes is clearly excluded under *Miranda* and *Wong Sun*, and the Government's introduction of the Glock found in the defendant's bedroom on the shelf as a result of his unconstitutionally obtained confession. If anything, to adopt the Government's rule would allow it to make *greater* use of the confession than merely introducing the words themselves.

Accordingly, we decline to adopt the position of the Third and Fourth Circuits that the *Wong Sun* fruits doctrine never applies to *Miranda* violations.

2. Faulkingham

With its recent decision in *United States v. Faulkingham*, 295 F.3d 85 (1st Cir. 2002), the First Circuit rejected the Third and Fourth Circuits' blanket refusal to apply *Wong Sun* suppression to the fruits of a

Miranda violation. *Id.* at 90-91. *Faulkingham* acknowledged, contrary to *Sterling* and *DeSumma*, that *Dickerson*'s recognition that *Miranda* violations are constitutional violations strengthened the argument that their physical fruits must be suppressed. *Id.* at 92-93. However, *Faulkingham* concluded that suppression of the fruits of a *Miranda* violation was not required in every case. Rather, it adopted a rule mandating suppression of the fruits of a *Miranda* violation in individual cases where "a strong need for deterrence" outweighs the reliability of that evidence. *Id.* at 93. Because the physical fruits of a *Miranda* violation generally will be trustworthy evidence, it appears that in most cases the First Circuit's analysis boils down to a rule excluding the fruits of a *Miranda* violation only when there is a "strong need for deterrence." On each of *Faulkingham*'s two basic points—that *Dickerson* alters the analysis regarding suppression of the fruits of a *Miranda* violation, and that suppression of the physical fruits is required where necessary to effectuate *Miranda*'s deterrent purpose—we agree with the First Circuit. For reasons already stated above, we conclude that each of these propositions is compelled by Supreme Court precedent.

Turning to the application of this standard to circumstances—present both in *Faulkingham* and in the present case—where an officer negligently rather than intentionally violates a defendant's *Miranda* rights, however, we disagree with the First Circuit. In *Faulkingham*, the court concluded that, where the *Miranda* violation resulted from mere negligence on the part of the interrogating officer, there is no strong need for deterrence and thus the physical fruits of the violation need not be excluded. We conclude that

Faulkingham's cramped view of deterrence leads it to an erroneous conclusion regarding negligent *Miranda* violations.

Faulkingham asserted, without elaboration, that "[o]nce the un-*Mirandized* inculpatory statements of the defendant are themselves suppressed, the role of deterrence under the Fifth Amendment becomes less primary." *Id.* at 92. The heart of the court's analysis is the following:

> Where, as here, negligence is the reason that the police failed to give a warning, the role of deterrence is weaker than in a case . . . where the apparent reason the police failed to give a warning was their intention to manipulate the defendant into giving them information.
>
> Faulkingham's claim, taking all the surrounding circumstances into account, simply does not tip the balance toward a strong need for deterrence. Faulkingham's statement was not the result of "coercive official tactics." There was no deliberate misconduct by the [police] agents here. There was no misleading or manipulation by the government . . . . The findings of the magistrate judge and the trial judge give us no reason to think that the agents deliberately failed to give the warning in order to get to the physical evidence or that they did so to get to another witness who might or might not incriminate Faulkingham. The agents' negligence resulted in the suppression of Faulkingham's confession, itself a detriment to the agents . . . .

Id. at 93-94 (citation to opinion below omitted). The court noted that "Faulkingham himself started talking without much questioning" and observed that "there is

nothing to shock the conscience of the court and no fundamental unfairness." *Id.* at 94. In light of the totality of the circumstances, the court held "that Faulkingham's far weaker argument for recognition of a deterrence interest for suppression of derivative evidence arising from a negligent violation of his *Miranda* rights is insufficient to carry the day." *Id.*

We do not believe that "the role of deterrence . . . becomes less primary" once the statement itself has been suppressed. *Id.* at 92. Instead, the relevant question remains whether suppression of the statement alone provides deterrence sufficient to protect citizens' constitutional privilege against self-incrimination. As we already have stated above, *see supra* at 1026-27, we answer this question in the negative.

Nor do we share *Faulkingham*'s view that there is a strong need for deterrence only where the officer's actions were deliberate rather than negligent. Finally, *Miranda* itself made clear that the privilege against self-incrimination was animated, not by a desire merely to deter intentional misconduct by police, but by the "one overriding thought" that "the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens." *Miranda*, 384 U.S. at 460, 86 S. Ct. 1602; *see also id.* ("[T]he privilege has come rightfully to be recognized in part as an individual's substantive right . . . to a private enclave where he may lead a private life." (internal quotation marks omitted)). The personal right to be free of government invasions of the privilege against self-incrimination is violated just as surely by a negligent failure to administer *Miranda* warnings as a deliberate failure. Deterrence is necessary not merely to deter intentional wrongdoing, but also to ensure that

officers diligently (non-negligently) protect—and properly are trained to protect—the constitutional rights of citizens. The call for deterrence may be somewhat less urgent where negligence rather than intentional wrongdoing is at issue, but in either case we conclude that the need is a strong one.

Moreover, we conclude that a rule limiting *Wong Sun* suppression of the physical fruits of a *Miranda* violation to situations where the police demonstrably acted in intentional bad faith would fail to vindicate the exclusionary rule's deterrent purpose. Even in cases where the failure to administer warnings was calculated, obtaining evidence of such deliberate violations of *Miranda* often would be difficult or impossible. *Cf. Whren v. United States*, 517 U.S. 806, 814, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) (noting that one reason for the Court's adoption of an objective test for the reasonableness of a seizure was "the evidentiary difficulty of establishing subjective intent" of officers). An exclusionary rule turning on the subjective motivation of the police officer would burden courts with the difficult task of discerning, from the particular facts of each case, the thought processes of the officer that resulted in the *Miranda* violation. *See Carter*, 884 F.2d at 374 (reasoning that courts should not "once again be embroiled in the endless case-by-case voluntariness inquiries *Miranda* was designed to prevent [because] the ease-of-application rationale enunciated by the Supreme Court will be largely nullified"). We believe a rule that provides certainty in application and clarity for the officers charged with operating under it better serves the interests of citizens, officers, and judicial efficiency.

Accordingly, we agree with the First Circuit's conclusion that the *Wong Sun* fruits doctrine may apply to

the physical fruits of *Miranda* violations, but we decline to adopt *Faulkingham*'s view that the physical fruits of a negligent *Miranda* violation are admissible. As a practical matter, we agree with the view of the United States District Court for the District of Maine, expressed in an opinion issued prior to *Faulkingham*:

> Prior to the decision in *Dickerson*, the issue of suppression of evidence discovered as a result of a violation of *Miranda* turned on a complex and largely opaque analysis attempting to resolve on an ad hoc basis the tension between the reliability of the subject evidence and the goal of deterrence of police misconduct. This Court believes all of that has gone by the board with the conferral by *Dickerson* of constitutional status on the right to a Miranda warning.

United States v. Kruger, 151 F. Supp. 2d 86, 101-02 (D. Me. 2001) (citations omitted), *overuled by Faulkingham*, 295 F.3d at 90-94.

As explained above, we conclude that *Miranda*'s deterrent purpose would not be vindicated meaningfully by suppression only of Patane's statement. We hold that the physical fruits of this violation must be suppressed.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's order suppressing the gun.[9]

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[9] Defendant Appellee's Motion to Clarify Statements Made in Defendant Appellee's Previously Filed Answer Brief is denied as moot.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-1503

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

SAMUEL FRANCIS PATANE, DEFENDANT-APPELLEE

Filed Dec. 9, 2002

ORDER

Before: EBEL, ANDERSON, and HENRY, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

/s/ by: AUDREY F. WEIGEL
Deputy Clerk